PROBLEMS IN PROBATE AND ADMINISTRATION

Executor de Son Tort

WHENEVER one not appointed executor or administrator wrongfully intermeddled with the goods of the deceased he was known as an executor *de son tort*.[1] It was commonly said that he had all of the duties but none of the rights of a real executor.[2] Such an intermeddling would seem to be a tort for which the rightful executor or administrator could, if already appointed, sue,[3] or, if later appointed, take proceedings by relation back.[4] This simple procedure would seem to-day amply to protect the estate. But under the older law confusion, it was thought, might result if such were the sole remedies of the estate. The executor was conceived as taking title from the will, not from the probate court.[5] He had a *prima facie* right to the surplus, if no residuary legatee were named.[6] Consequently the court had no discretion but to appoint him,[7] unless indeed he were insane.[8] And the probate judge could not require of him a bond, if he were insolvent or otherwise unsuitable.[9] He could, therefore, bring a writ and his general acts bound the estate before probate, provided the will were at some later time proved, even though the executor himself never obtained letters.[10] Such being the case a wrongful intermeddler by taking possession of the estate might well mislead strangers into thinking there was a will in which he was named executor. And this fact could not be verified, for, as a rightful executor could act without proving the will, those interested might well feel that there was no use in searching probate records to

---

[1] 1 Williams, Executors, 10 ed., 183.
[2] Carmichael *v.* Carmichael, 2 Phill. C. C. 101, 103 (1846).
[3] 1 Woerner, Amer. Law Adm., 2 ed., § 193.
[4] See *infra*, page 319.
[5] Smith *v.* Milles, 1 T. R. 475, 480 (1786).
[6] 1 Williams, Executors, 10 ed., 1217.
[7] Rex *v.* Raines, 1 Ld. Raym. 361 (1698).
[8] Evans *v.* Tyler, 2 Rob. (Eccl.) 128, 133, 134 (1849).
[9] Rex *v.* Raines, *supra*.
[10] Brazier *v.* Hudson, 8 Sim. 67 (1836).

find his appointment. Thus grew up, as much as a protection to those interested as a penalty on the wrongdoer, the essential features of the anomalous doctrine of executor *de son tort:* that a creditor, legatee or next of kin after debts paid could proceed directly against the intermeddler as executor.[11]

In such action he was named as executor generally.[12] Accordingly he could so plead that he was only liable to the extent of the assets that came to his hands.[13] And he could show under the plea of *plene administravit* that he paid debts of equal or of superior degree to that of the plaintiff.[14] Whether the wrongdoer was chargeable by the executor merely as a tortfeasor or had incurred the liability of an executor *de son tort* when there was a duly appointed representative in existence at the time of his acts seems to have depended upon whether the wrongdoer interfered with the estate as executor.[15] In any event it seems clear that he could plead in mitigation of damages, though not in bar, of the suit of the true executor or administrator, payment of debts of the estate.[16]

In Coulter's case[17] it was said: "it is clear, that all lawful acts, which an executor *de son tort* doth, are good." The difficulty with this statement is that it is not clear what acts are "lawful acts." It must be remembered also that an executor *de son tort* did not have all the rights of a true executor. He could not, for instance, retain for his own debt,[18] nor if the estate was insolvent, prefer one creditor to another of equal degree.[19] Apparently the act of the wrongdoer was good only if it was such an act as the true executor was bound to perform, subject to the qualification that the intermeddler was acting as executor, and to a greater extent than the solitary act

[11] 1 WOERNER, AMER. LAW ADM., 2 ed., § 193.

[12] COULTER'S CASE, 5 Co. 31 *a*.

[13] Dyer, 166 marg.

[14] Oxenham *v.* Clapp, 2 B. & Ad. 309 (1831).

[15] 1 WILLIAMS, EXECUTORS, 10 ed., 186, 187.

[16] Roggenkamp *v.* Roggenkamp, 68 Fed. 605 (1895); Brown *v.* Walter, 58 Ala. 310 (1877); Leach *v.* Prebster, 35 Ind. 415 (1871); Tobey *v.* Miller, 54 Me. 480 (1865); Glenn *v.* Smith, 2 Gill & J. (Md.) 493 (1830); Gay *v.* Lemee, 32 Miss. 309 (1856); Lenderink *v.* Sawyer, 92 Neb. 587 (1912); Howell *v.* Smith, 2 McCord (S. C.) 516 (1823); Kinard *v.* Young, 2 Rich. Eq. (S. C.) 247 (1846); McElveen *v.* Adams, 94 S. E. 733 (S. C.) (1917); Oxenham *v.* Clapp, 2 B. & Ad. 309 (1831); Am. & Eng. Ann. Cas. 1914A, 263, note.

[17] 5 Co. 30 *b*.

[18] Alexander *v.* Lane, Yelv. 137.

[19] 1 WILLIAMS, EXECUTORS, 10 ed., 195.

complained of.[20] If, then, the original intermeddler, acting as executor, used the assets in paying valid debts of the estate, the anomalous principles of the general doctrine of executor *de son tort* seem to have protected the creditors thus paid.[21] And, if assets were sold to pay debts and debts were thus paid, the purchaser should have been protected.[22] Probably, however, these anomalies did not extend so far as to protect a debtor of the estate in payments to the executor *de son tort;*[23] though the debtor logically should have been able to invoke them if the money was used in the proper administration of the estate. Though something might perhaps be said for this curious doctrine under the old English law, there should be nothing left of it under a system which assimilates executors to administrators by giving the court a discretion in their appointment, by requiring them to file bonds, and by abolishing the old presumption in regard to the residue of the estate; in short, where the executor takes title not from the will but from the court.[24] Such is the theory of the executor's right in a number of the United States, and in some of our jurisdictions the law of executor *de son tort* is abolished;[25] and in others it is falling into disuse.[26]

---

[20] 1 WILLIAMS, EXECUTORS, 10 ed., 195; Mountford *v.* Gibson, 4 East, 441 (1804). But see Dorsett *v.* Frith, 25 Ga. 537 (1858).

[21] Thomson *v.* Harding, 2 E. & B. 630 (1853).

[22] Roumfort *v.* McAlarney, 82 Pa. 193 (1876); Pickering *v.* Thompson, 24 Ont. L. Rep. 378 (1911). But see Carpenter *v.* Going, 20 Ala. 587 (1852); Woolfork *v.* Sullivan, 23 Ala. 548 (1853).

[23] See Lee *v.* Chase, 58 Me. 432, 435 (1870).

[24] 1 WOERNER, AMER. LAW ADM., 2 ed., § 172.

[25] ALABAMA, CODE (1907) § 2801; Bowden *v.* Pierce, 73 Cal. 459, 463, 14 Pac. 302 (1887); FLORIDA, COMP. LAWS (1914) § 2411; KANSAS, GEN. STATS. (1915) § 4495; MINNESOTA, GEN. STATS. (1913) § 8177; Rozelle *v.* Harmon, 29 Mo. App. 569, 103 Mo. 339, 15 S. W. 432 (1888); Dixon *v.* Cassell, 5 Ohio, 533 (1832); OREGON, LAWS (1910) § 384; Ansley *v.* Baker, 14 Tex. 607 (1855); WASHINGTON, CODES STATS. (1915) § 971; WISCONSIN, STATS. (1915) § 3259.

On the other hand, the doctrine has been perpetuated by statute in some states. GEORGIA, ANNOT. CODE (1914), § 3886; MASSACHUSETTS, REV. LAWS (1902), c. 139, §§ 14, 15; MAINE, REV. STATS. (1916), c. 68, § 40; MISSISSIPPI, ANNOT. CODE (1917), § 1768; NEVADA, REV. LAWS (1912), §§ 5952–55; NEW HAMPSHIRE, PUB. STATS. (1901), c. 188, § 16; NEW JERSEY, COMP. STATS. (1910), § 2258; NORTH CAROLINA, REVISAL (1908), § 2; RHODE ISLAND, GEN. LAWS (1909), c. 312, § 30; SOUTH CAROLINA, CODE (1912), § 3621; VERMONT, PUB. STATS. (1906), § 2860.

In Georgia, Nevada, New Hampshire, and Vermont the executor *de son tort* is liable for double the value of the goods appropriated by him. See references in preceding paragraph of this note.

[26] See Rozelle *v.* Harmon, 29 Mo. App. 569, 578 (1888).

EFFECT OF PROBATE AND ADMINISTRATION

It is common knowledge that by statute an executor or administrator may sue for a tort to the property of the estate committed during the life of the deceased. This *chose in action* is as much an asset as a watch or a horse. But suppose after the death of the decedent and before the appointment of the personal representative a similar wrong is done to the estate.

If the deceased died intestate, the assets passed on death to the ordinary, who was usually the bishop. The statute of Westminster the Second, c. 19 (1285), recognized that personal property of an intestate passed immediately to the ordinary.[27] The Statute of 31 Edw. III (1357), c. 11, required

"that in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods; (2) which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's court. . . . (4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as of the time to come."

By Stat. 22 & 23 Car. II, c. 10 (1670), the administrator became bound to distribute the surplus. The Probate Amendment Act, 21 & 22 Vict., c. 95, § 19 (1858), expressly vested the personal estate of an intestate until letters granted in the judge of the Court of Probate "in the same Manner and to the same Extent as heretofore they vested in the Ordinary." Though the property was in the ordinary, it was hardly possible for him to sue for a tort to the estate while he held title, for the object of Stat. 31 Edw. III, c. 11, was to take the administration from him.[28] Indeed, subdivision 4 of c. 11 made the administrator accountable as executor "as well

[27] See Dyer, C. J., in Graysbrook *v.* Fox, 1 Plowd. 275, 279.

[28] In Graysbrook *v.* Fox, 1 Plowd. 278, Weston, J., said referring to the statute, 31 Edw. 3, c. 11: "And the reason thereof seems to be because the Ordinary is a spiritual Governor, wholly conversant in spiritual Causes, to whom it is inconvenient to toil in the temporal Concerns of others, and therefore the Statute has given him Liberty to appoint others to take the Trouble of the Administration of the Interstate's Goods, and they shall have Power as Executors, and may recover the Debts of the Intestate; and so it has remedied the said Mischief." Dyer, C. J., and Walsh, J., said on page 279: "And Administrators are appointed by the Ordinary for his Ease, and to discharge himself of the Burden of the Office."

of the time past as the time to come." Therefore it was decided three centuries ago that title of an administrator related back to give him a right to sue in trover.[29] And this was extended to other forms of action.[30] At law the administrator must show an appointment antedating the writ;[31] though in equity it is sufficient to produce letters at the hearing, provided the bill alleges grant of letters.[32]

As to an executor: from the earliest times it was conceived that he took title from the will and not from the ordinary.[33] Accordingly he could sue at law before appointment, though, "for the enforcing of probates," he must prove his appointment before he declared.[34] In equity the rule as to executors was the same as in the case of administrators.[35]

While the principle of relation back was a familiar doctrine of the law of administration, difficulties arose when it was attempted to extend it to all situations. Suppose the personal representative before letters granted dealt with the estate in a certain way, did his later appointment make valid his acts? First, it may be supposed that the administrator before letters granted gives away part of the estate to one not entitled to distribution who may be either (*a*) a fellow wrongdoer, or (*b*) an innocent donee. In both these cases the person receiving the property should disgorge even though the donor later obtains letters;[36] for, indeed, even had authority existed before the act, the donee would not have been able as against a credi-

---

[29] Locksmith *v.* Creswel, 2 Roll. Ab. 399.

[30] *Trespass*, Thorpe *v.* Stallwood, 5 M. & G. 760 (1843); Brackett *v.* Hoitt, 20 N. H. 257 (1850). *Indebitatus Assumpsit*, Welchman *v.* Sturges, 13 Q. B. 552 (1849); Dempsey *v.* McNabb, 73 Md. 433, 21 Atl. 378 (1891); Brown *v.* Lewis, 9 R. I. 497 (1870). Probably actions for injuries to leasehold property, Barnett *v.* Guildford, 11 Exch. 19, 31 (1855). But *detinue*, see Crossfield *v.* Such, 8 Exch. 825 (1853). In Patten *v.* Patten, Alc. & N. 493 (1833) it was held that on ejectment by an administrator the fictitious demise might be laid before grant of letters. Compare Foster *v.* Bates, 12 M. & W. 226 (1843).

[31] Wankford *v.* Wankford, 1 Salk. 299, 303.

[32] Humphreys *v.* Humphreys, 3 P. Wms. 349 (1734); Fell *v.* Lutwidge, Barnard. Ch. 319, 320 (1741); Horner *v.* Horner, 23 L. J. Ch. 10 (1854); 1 DANIEL, CHANCERY PRACTICE, 6 Am. ed., 318, 319. See Y. B. 18 Hen. VI. 22 *b*.

[33] Graysbrook *v.* Fox, 1 Plowd. 275, 280; 2 Roll. Abr. 554; Prattle *v.* King, T. Jones, 169.

[34] Anon. 1 Roll. Abr. 917; Wankford *v.* Wankford, 1 Salk. 299, 303. Mitchell *v.* Smart, 3 Atk. 606 (1747).

[35] 1 DANIEL, CHANCERY PRACTICE, 6 Am. ed., 318, 319.

[36] See Morgan *v.* Thomas, 8 Exch. 302 (1853); Haselden *v.* Whitesides, 2 Strob. (S. C.) 353 (1847).

tor or next of kin to retain what he had received, unless he had changed his position before full knowledge of the breach of trust.[37]

Second, imagine that the administrator before appointment sells assets to (*a*) a fellow wrongdoer, or (*b*) acting as administrator to an innocent purchaser. The authorities are divided on the efficacy of relation back of a later acquired authority as a protection to the buyer. Some cases state the rule to be that, if the act of the administrator would have been rightful when done by a representative *de jure*, such protection will be granted.[38] Other authorities require for the validity of the transfer that the act be not prejudicial to the estate.[39] The latter rulings, while the cases do not carefully distinguish between different situations, tend in the right direction. On principle it would seem that all transactions with one whose only association with the decedent is a possibility of appointment as representative should be discouraged, for ordinarily such transactions are unnecessary. Therefore, one who buys knowing all the facts should derive no protection from a later appointment except to the extent that what he has paid the administrator is actually applied for the benefit of the estate.[40] So far as he pays less than full value, and so far as what he pays never reaches the creditors or next of kin, he should take the risk. This principle, however, must be qualified in the extreme case of perishable property sold for full value by one who in all likelihood will be appointed administrator.[41] The same risks should fall on one buying in ignorance of the absence of letters from a prospective administrator

[37] On change of position, see *infra*, page 344. If the donee was under the statute of distributions entitled to the payment relation back of the later appointment should validate the transfer, for the estate is not prejudiced. Compare note 39.

[38] McDearmon *v.* Maxfield, 38 Ark. 631 (1882); Moore *v.* Wright, 4 Ill. App. 443 (1879); McClure *v.* People, 19 Ill. App. 105 (1886); Alvord *v.* Marsh, 12 Allen (Mass.) 603 (1866); Magner *v.* Ryan, 19 Mo. 196 (1853); Rattoon *v.* Overacker, 8 Johns. (N. Y.) 126 (1811); Outlaw *v.* Farmer, 71 N. C. 31 (1874) (*semble*); Casho *v.* Murray, 47 Ore. 57, 81 Pac. 388, 883 (1905) (*semble*); Vroom *v.* Van Horne, 10 Paige (N. Y.) 549 (1844); Cook *v.* Cook, 24 S. C. 204 (1885); Whitehall *v.* Squire, 1 Salk. 295. See The Globe Ins. Co. *v.* Gerisch, 163 Ill. 625 (1896).

Some of these opinions state broadly that the later acquired appointment validates all prior acts. The facts of the cases, however, do not justify this generalization.

[39] See Wilson *v.* Hudson, 4 Harr. (Del.) 168 (1844); Gilkey *v.* Hamilton, 22 Mich. 283 (1871) (*semble*); Bradbury *v.* Reynel, Croke Eliz. 565; Middleton's Case, 5 Co. 28 *b* (*semble*); Morgan *v.* Thomas, 8 Exch. 302 (1853) (*semble*); Doe d. Hornby *v.* Glenn, 1 A. & E. 49 (1834).

[40] The same principles should apply to one who pays prematurely a debt due the estate.

[41] See Tucker *v.* Whaley, 11 R. I. 543 (1877); Perkins *v.* Ladd, 114 Mass. 420 (1874).

who purports to act in a representative capacity. It is a simple matter to-day for such a fiduciary to provide himself with a certified copy of his appointment by the probate court. In fact every businesslike administrator keeps on hand such a copy to facilitate transfers. The absence of authority should put on his guard every reasonable buyer. He who omits to take the simple precaution of demanding evidence of power should bear the burdens resulting from such neglect.[42]

Third, it may be supposed that the administrator sells as his own assets of the estate to an innocent buyer, and receives inadequate compensation. To the extent that the purchaser has profited it does not seem unjust that the administrator, when later appointed, should compel for the benefit of the estate a further payment. But if full value has been paid must the purchaser give back what he has received when the administrator has wasted the proceeds of the sale? It may be urged that the whole sale is a nullity as made by one who has no title. But this theory would abrogate entirely any doctrine of relation back. And such a doctrine does exist, and is entirely in accord with the spirit of the early administration statutes. Again, it may be said that the nearest analogy to the doctrine of relation back in administration is ratification of a quasi agent's act by a quasi principal, and that the first step in ratification is that the quasi agent act in the name of the quasi principal. And here *ex hypothesi* the administrator acted in his own name. But this limitation of ratification confines the logical but extreme doctrine of undisclosed principal within due bounds by preventing contracting parties from becoming liable to unexpected persons except in restricted cases. In administration the so-called ratification is through the appointment by a court of the very person who did the act, — the quasi agent and the quasi principal are the same, and very different considerations govern. It is merely a question whether a due regard for the rights of the estate require us to ignore the unfortunate situation of the purchaser. It seems fairer on the whole to protect the latter. The estate has many benefits from the doctrine of relation back, and should accept this burden, which, it may be noted, is not a real burden if the administrator's bond is adequate.[43]

[42] See cases cited in notes 38 and 39.

[43] See cases cited in notes 38 and 39. The distinctions between the second and

An executor named in a will could act freely without appointment from the probate court. This followed naturally from the old notion that an executor took title from the will and not from the court.[44] So long as the will was at some time proved, even though the executor had previously died, his acts were valid.[45] In the United States, however, where the executor has to rely on his appointment from the court,[46] the rules in regard to administrators explained above should obtain. The old law is followed, however, in some states.[47] Other courts with more reason treat executors and administrators alike.[48]

Revocation of Probate and Administration

Where an executor under a forged will, or an administrator inadvertently appointed in derogation of a nearer relative of the deceased, has his appointment revoked by one entitled to administer, the law with good reason is well settled. If debtors to the estate have paid their debts to the first appointee who has then wasted the money, they are fully protected against another demand by the second appointee.[49] Likewise those who have purchased property of the estate as such for full value with no intent to spirit away the particular chattel or to allow the first representative to divert the proceeds to his own use should be entitled to keep what they have

---

third groups of cases dealt with in the text is not clearly brought out either in the facts or the opinions of the authorities.

The administration bond required by Stat. 22 & 23 Car. II, c. 10, §§ 1–3, and by many of our statutes makes the administrator and sureties responsible for all "goods, chattels, and credits of the said deceased which *have* or shall come to the hands, possession, or knowledge of him."

[44] Dyer, C. J., in Graysbrook *v.* Fox, 1 Plowd. 275, 280; Middleton's Case, 5 Co. 28 *b*; Wankford *v.* Wankford, 1 Salk. 299, 301; Roe *v.* Summerset, 2 W. Bl. 692.

[45] Brazier *v.* Hudson, 8 Sim. 67 (1836); Johnson *v.* Warwick, 17 C. B. 516 (1856).

[46] 1 Woerner, Amer. Law Adm., 2 ed., § 172.

[47] Thiefes *v.* Mason, 55 N. J. Eq. 456, 37 Atl. 1084 (1897); Magwood *v.* Legge, Harp. (S. C.) 116 (1824). See Hogan *v.* Wyman, 2 Oreg. 302 (1868); Shoenberger *v.* Lancaster Savings Institution, 28 Pa. 459 (1857).

[48] Carter *v.* Carter, 10 B. Mon. (Ky.) 327 (1850); Pinkham *v.* Grant, 78 Me. 158, 3 Atl. 179 (1886); Gay *v.* Minot, 3 Cush. (Mass.) 352 (1849); Stagg *v.* Green, 47 Mo. 500 (1871) (but see Wilson *v.* Wilson, 54 Mo. 213 (1873)); People *v.* Barker, 150 N. Y. 52, 44 N. E. 785 (1896); Monroe *v.* James, 4 Munf. (Va.) 194 (1814). See Wall *v.* Bissell, 125 U. S. 382 (1888); Gardner *v.* Gantt, 19 Ala. 666 (1851).

[49] Allen *v.* Dundas, 3 T. R. (1789) 125. And see Mo. Pac. Ry. Co. *v.* Bradley, 51 Neb. 596, 71 N. W. 283 (1897); Zeigler *v.* Storey, 220 Pa. 471, 69 Atl. 894 (1908); Schluter *v.* Bowery Savings Bank, 117 N. Y. 125, 22 N. E. 572 (1889).

bought.[50] And this is entirely independent of the disposition made by the administrator of the consideration received by him. There are plenty of analogies in the law to support the power of one who has no title, or a defeasible title, to transfer it. The registry acts allow a grantor of an unrecorded deed to A to transfer title which is in A to B, who without notice of A registers his document;[51] an agent without title may of course transfer it, even contrary to instructions;[52] a disseisor of land may convey title to crops which he has severed from the soil to a *bonâ fide* purchaser for value;[53] a pledgee by observing proper formalities may transfer the pledgor's title;[54] and, finally, the case of sale in market overt furnishes a common law analogy.[55] Indeed the position of the administrator is better than that of the seller in many of these cases; for he is acting under appointment of the court. He is not only a representative *de facto*, but *de jure*. And, though no case has been found clearly pointing this out, nothing should turn on whether the first appointee acted as a fiduciary or on his own behalf; he has title and can transfer it. The case of a distributee, however, is very different from that of a debtor paying his debt, or of a purchaser from the estate. They are volunteers; and, if they take under a forged will, or administration later revoked, they should disgorge in favor of the second administrator,[56] unless under principles of quasi contracts they have changed their position.

Hitherto it has been imagined that the grant of probate or administration has been in derogation of the right of one rightfully entitled to administration. Where the revocation is effected at the instance of one selected by the testator to wind up his estate, *i. e.*, an executor, the law was not so clear. The earliest case is Y. B.

---

[50] BROOKE'S ABR. (1576) Tit. Administrators, 33; Packman's Case, 6 Co. 18 *b*; Semine *v.* Semine, 2 Lev. 90; Boxall *v.* Boxall, 27 Ch. D. 220 (1884). See *infra* American cases where grant is in derogation of will. Compare Woolley *v.* Clark, 5 B. & Ald. 744 (1822). In Foulke *v.* Zimmerman, 14 Wall. (U. S.) 113 (1871) and Thompson *v.* Samson, 64 Cal. 330 (1883), purchasers from distributees under the earlier appointment were protected.

[51] TIFFANY, REAL PROPERTY, § 476.

[52] WILLISTON, SALES, § 317.

[53] Stockwell *v.* Phelps, 34 N. Y. 363 (1866).

[54] JONES, COLLATERAL SECURITIES, 3 ed., § 603.

[55] WILLISTON, SALES, § 347.

[56] Thompson *v.* Samson, 64 Cal. 330, 30 Pac. 980 (1883); Fallon *v.* Chidester, 46 Iowa, 588 (1877); *In re* West, [1909] 2 Ch. 180.

7 Edw. IV, Trin. *ff.* 12, 13, where Littleton, J., with the concurrence of Newton and Danby, JJ., said:

"A man may make me his executor unknown to me etc. And then when I have become aware of it I may well take on myself the power of administration and disposition etc. And Sir the Ordinary may well grant administration in the meantime as he did here, but by the proving of the will the power of the administrator is determined unless the executor has refused some time before the Ordinary then perhaps the law will be otherwise."

In Fitzherbert's Abridgment (1565)[57] and Brooke's Abridgment (1576)[58] the passage is similarly cited. In Rolle's Abridgment (1668)[59] and in Viner's Abridgment (1753)[60] the same proposition is stated as follows:

"If a man makes an executor, but it is not known, or concealed, the Ordinary may grant administration, and this shall be good till the other prove the will. 7 Edw. 4, 12 f. 13."

But the leading case until recent years was *Graysbrook* v. *Fox*.[61] The plaintiff executor under the will of Kene brought detinue for chattels. The defendant pleaded that Kene died possessed of the chattels, that administration of his goods was granted, and that before probate of the will the administrator sold the goods to the defendant. The plaintiff's demurrer was sustained by Dyer, C. J., and Walsh, J.; Weston, J., dissenting.

Walsh, J., said:[62]

"And administrators are appointed if the Ordinary for his Ease, and to discharge himself of the burden of the office, and they take their Commencement by a spiritual Act *viz.* by the Letters of Administration, and have Authority over a Thing temporal. But the Executor takes his Commencement by a temporal Act, *viz.* by the making of the Will of the Testator, which is a temporal Act, but takes its perfection by a spiritual Act, *viz.* by Probate in the Spiritual Court, and the Executor's Authority is over a Thing temporal. But the Ordinary or Administrator have no Authority or interest, unless the deceased die intestate."

Lord Dyer said (p. 280 *a*):

"Then if the Law, immediately after the Death of the Testator, vests the Property and the Possession of his Goods in the Executor, from thence

[57] Administratours, par. 8.
[58] Executors, par. 111.
[59] Page 907.
[60] Page 66.
[61] Plowd. 275 (1565).
[62] Page 279 *a*.

it follows that the Law never vests the Property in the Ordinary, and from thence it follows that the law never vests the property in the Administrator."

For this proposition the Chief Justice cites, however, Y.B. 7 Edw. IV, Trin. 12, which is, if anything, an authority in favor of the administrator. Walsh, J. (p. 282), with the concurrence of all his associates, later said:

"If the defendant here had averred that the Administrator had aliened the Goods to him for a certain Sum, and had employed the Money in Discharge of the Funeral, or of the Debts of the deceased, or about other Things which an executor should be forced to do, there the Sale for such Purposes should not be avoided, but should remain indefeasible; and the Reason is, because by the Commission of the Administration to him by the Ordinary, who was ignorant of the Testament, he has a Colour of Authority, though it is not a rightful one and he that has the Right suffers no Disadvantage although he be found by the Act of the Administrator, for it is no more than he himself was compellible to do."

It is difficult to see how this concession can be reconciled with the statement that the property was always in the executor and never in the administrator.

Abram v. *Cunningham*[63] went even further than *Graysbrook* v. *Fox*, when it held that title given by an administrator *de bonis non* was worthless as against the claim of an administrator to the executor. *Wolley* v. *Clark*[64] was an action by an executrix against the administrator and one to whom he sold goods after both had notice of the will which was later proved. The plaintiff was successful. But the element of notice differentiated the case from the earlier authorities. In *Boxall* v. *Boxall*,[65] through the suppression of a will containing no appointment of an executor, a grant of administration was secured and a sale made thereunder to one ignorant of the concealment. This sale was held to be good though the letters were later revoked. The omission of an executor from the will makes this case, too, distinguishable. The same may be said of *Craster* v. *Thomas*,[66] owing to the Indian Succession Act, 1865. But *Ellis* v. *Ellis*[67] was a clean case in support of *Graysbrook* v. *Fox*

[63] 2 Lew. 182.
[64] 5 B. & Ald. 744.
[65] 27 Ch. D. 220.
[66] [1909] 2 Ch. 348.
[67] [1905] 1 Ch. 613.

and *Abram* v. *Cunningham*, both of which had been cited as law in leading books.[68]

In spite of this line of cases there is a trend of authority leading in the other direction. The year book case is the earliest authority. Moreover the courts have held, as we have seen, that an administrator, or an executor under a forged will, can give a good discharge to the deceased's debtor.[69] And then there are the cases of administrations *durante minore aetate, pendente lite, durante absentia,* and *durante animi aut corporis vitio.*[70]

The administration *durante minore aetate* was recognized at common law in Piggot's case,[71] though later it rested in part on Stat. 38 Geo. 3, c. 87, § 6. It has not clearly been decided whether in the event of such an administrator selling not in due course of administration to one who purchases in good faith that an indefeasible title passes. But Williams states that it does;[72] and in the recent case of *In re Cope*[73] Jessel, M. R., said of such a representative

"The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him."

An administration *pendente lite* when the controversy before the ordinary had to do with a will was once considered utterly void.[74] But it was held later that such an administrator could receive debts of the estate, though, indeed, it was said by way of *dictum* that the property in the goods was in the executor.[75] If the executor named in the will or the next of kin were out of the country the probate court had power to grant before probate obtained or letters issued an administrator *durante absentia.*[76] It has been held that an administrator *de bonis non cum testamento annexo durante absentia*

[68] 1 WILLIAMS, EXECUTORS, 10 ed., 461, 462. But see 1 WOERNER, AMER. LAW ADM., 2 ed., § 274.

[69] Allen *v.* Dundas, 3 T. R. 125 (1789); Prosser *v.* Wagner, 1 C. B. (N. S.) 289 (1856).

[70] Compare Patton's Appeal, 31 Pa. St. 465 (1858).

[71] 5 Rep. 29.

[72] 1 WILLIAMS, EXECUTORS, 10 ed., 393.

[73] 16 Ch. D. 49, 52.

[74] Frederick *v.* Hook, Carth. 153.

[75] Walker *v.* Woollaston, 2 P. Wms. 576, 588 (1731).

[76] Clare *v.* Hedges, 1 Lutw. 342.

could make a good title to leaseholds belonging to the estate.[77] In *Slater* v. *May*,[78] Chief Justice Holt said:

"that it was reasonable there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minori aetate* of an executor, *viz.* that there should be a person to manage the estate of the testator, till the person appointed by him is able."

Administration may also be granted temporarily during the illness or lunacy of the executor;[79] or pending a search for a lost will;[80] or until the will should arrive from a foreign country.[81]

These administrations admit the principle of a power and, at least in the case of an administration *durante minore aetate*, a complete power, to deal with the estate even though there be an executor. The logical result of the holding in *Graysbrook* v. *Fox* would be to hold all these administrations void, "traps for the unwary."[82]

At length the law of England received a definite turn in the right direction in the recent case of *Hewson* v. *Shelley*[83] in the Court of Appeal. Letters were granted to the widow of a man who was erroneously supposed to have died intestate. The administratrix sold to a purchaser a portion of the deceased's real estate. A will was found and executors appointed. In an action by the executors to recover possession of the realty sold the Court of Appeal, reversing Astbury, J., who conceived himself bound by the earlier cases, held that the grant of administration was not void and that the purchaser had acquired a good title. Phillimore, J., after reviewing the earlier authorities said (p. 44):

"It seems to me that the true view is that till the Ordinary was concluded by probate he had for the benefit of all those interested, including, at any rate in ancient times, the soul of the deceased for the repose of which masses were to be provided, the power to commit administration and to pass the property thereby, subject to that administration being recalled and the power and title of the administrator determined upon production possibly, upon probate certainly, of a will. . . . It is not as if we were asked to decide that the mere discovery of a will avoided all the acts

[77] Webb *v.* Kirby, 3 Sm. & G. 333 (1856).
[78] 2 Ld. Raym. 1071.
[79] Hills *v.* Mills, 1 Salk. 36.
[80] Goods of Wright, [1893] P. 21; Goods of Campbell, 2 Hagg. 555 (1829).
[81] Goods of Metcalfe, 1 Add. 343 (1822).
[82] Phillimore, L. J., in Hewson *v.* Shelley, [1914] 2 Ch. 13, 44.
[83] [1914] 2 Ch. 13.

of the administrator. If the will names no executor, if the executor be dead leaving no executor, if he or his executor if he takes his place refuses to take out probate and accept the executorship, the title of the administrator would, I gather, confessedly prevail. Those who have purchased goods from an administrator may find their title depend on the caprice of an executor or of an executor's executor."

These observations are clearly sound and in accord with the prevailing view in this country,[84] where the notion that an executor took title from the court and not from the will has had with good reason considerable following.

Administration granted in a state where the deceased did not reside and left no effects is void.[85] Distributees and purchasers from the representative get no title, and are liable, though innocent, as converters. The decree of the probate court which has no jurisdiction may be attacked collaterally.[86] Likewise administration on the estate of a living person is void.[87] In the United States in

[84] Fidelity Co. *v.* Freeman, 109 Fed. Rep. 847 (1901); Floyd *v.* Clayton, 67 Ala. 265 (1880); Meek *v.* Allison, 67 Ill. 46 (1873); Martin *v.* Dix, 134 Ga. 481 (1910); Schluter *v.* Bowery Savings Bank, 117 N. Y. 125, 22 N. E. 572 (1889); Kittredge *v.* Folsom, 8 N. H. 98 (1835); Barkaloo *v.* Emerick, 18 Ohio 268 (1849); Patton's Appeal, 31 Pa. 465 (1858); Zeigler *v.* Storey, 220 Pa. 471, 69 Atl. 894 (1908); Foster *v.* Brown, 1 Bailey L. (S. C.) 221 (1829); Benson *v.* Rice, 2 Nott. & McC. (S. C.) 577 (1820); Price *v.* Nesbit, 1 Hill Ch. (S. C.) 445 (1834); Pinkerton *v.* Walker, 3 Hayw. (Tenn.) 221 (1816); Franklin *v.* Franklin, 91 Tenn. 119, 18 S. W. 61 (1892). Fallon *v.* Chidester, 46 Iowa 588 (1877), *contra*. Compare Waters *v.* Stickney, 12 Allen (Mass.) (1866); Besançon *v.* Brownson, 39 Mich. 388 (1878); Kelly *v.* Davis, 37 Miss. 76 (1859); Ragland *v.* Green, 14 Sm. & M. (Miss.) 194 (1850).

In some states by statute all acts of a personal representative before revocation of his authority are as valid as if he had continued to execute his trust. CALIFORNIA, CODE CIV. PROC. (1916), § 1428; NORTH DAKOTA, COMP. LAWS (1913), § 8705; OHIO ANNOT. GEN. CODE (1912), § 10635; SOUTH DAKOTA, COMP. LAWS (1913) PROB. CODE, § 131; WISCONSIN, STATS. (1898), §§ 3815–17.

[85] Insurance Co. *v.* Lewis, 97 U. S. 682 (1878); Thormann *v.* Frame, 176 U. S. 350 (1900); Perry *v.* St. Joseph, R. Co., 29 Kan. 420 (1883); Thumb *v.* Gresham, 2 Met. (Ky.) 306 (1859); Hall *v.* L. & N. R. Co., 102 Ky. 480, 43 S. W. 698 (1897); Moise *v.* Mutual Life Association, 45 La. Ann. 736, 13 So. 170 (1893). Compare Appeal of Willetts, 50 Conn. 330 (1882); Record *v.* Howard, 58 Me. 225 (1870); Hoes *v.* N. Y. N. H. & H. R. Co., 173 N. Y. 435, 66 N. E. 119 (1903); Andrews *v.* Avory, 14 Gratt. (Va.) 229 (1858).

On jurisdiction to establish a *devastavit* against an executor, see Michigan Trust Co. *v.* Ferry, 228 U. S. 346 (1913).

[86] See cases in preceding note.

[87] Scott *v.* McNeal, 154 U. S. 34 (1894); 1 WOERNER, AMER. LAW ADM., 2 ed., §§ 208–13.

Some states by statute provide for the appointment of a receiver of the effects

general the probate court of the county where the deceased last dwelt has jurisdiction. If the deceased dwelt in another state, the court of the county in which he left effects. And, if there are more than one of these, the county where jurisdiction is first taken.[88] In England since Stat. 20 & 21 Vict., c. 77, § 23 (1857), but one court has jurisdiction.[89] Grant of probate or administration in the wrong locality is voidable, not void.[90]

REFUNDING

I

An executor or administrator is never protected in paying legacies or shares when a present existing liability of the estate known to him is outstanding; nor will a court order such a distribution. With respect to debts or liabilities known to the representative which are not yet due or may never become due, the situation of the executor or administrator is a difficult one. The English practice has not been uniform. It was held in *Simmons* v. *Bolland*[91] that the executors could not be compelled without security to deliver over to a residuary legatee the whole of the estate when there was a possible future liability on covenants made by the deceased. The practice of giving security has disappeared, but the executor or administrator, if he distribute the assets under order of court in

---

of an absentee, and a distribution of those effects after absence for a certain time. There is a division of opinion on the constitutionality of legislation of this sort. Cunnius *v.* Reading School District, 198 U. S. 458 (1905); Nelson *v.* Blinn, 197 Mass. 279, 83 N. E. 889 (1908); Clapp *v.* Houg, 12 N. D. 600, 98 N. W. 710 (1904); Carr *v.* Brown, 20 R. I. 215, 38 Atl. 9 (1897); Selden *v.* Kennedy, 104 Va. 826, 52 S. E. 635 (1906).

[88] 1 WOERNER, AMER. LAW ADM., 2 ed., § 204.

[89] For a description of jurisdiction of English probate courts prior to 1857, see 4 GRAY CAS. ON PROPERTY, 2 ed., 411–13.

[90] Holmes *v.* Oregon & California Ry. Co., 5 Fed. 523 (1881); Kling *v.* Connell, 105 Ala. 590, 17 So. 38 (1894); Irwin *v.* Scriber, 18 Cal. 499 (1861); Estate of Griffith, 84 Cal. 107, 23 Pac. 528 (1890); Tant *v.* Wigfall, 65 Ga. 412 (1880); Donahue *v.* Daniel, 58 Md. 595 (1882); McFeely *v.* Scott, 128 Mass. 16 (under statute) (1879); Johnson *v.* Beazley, 65 Mo. 250 (1877); Bolton *v.* Schriever, 135 N. Y. 65 (1892); Eller *v.* Richardson, 89 Tenn. 575, 15 S. W. 650 (1891); Burdett *v.* Silsbee, 15 Tex. 604 (1855); Fisher *v.* Bassett, 9 Leigh (Va.) 119 (1869) (*semble*). Miller *v.* Swan, 91 Ky. 36, 14 S. W. 964 (1890); Miltenberger *v.* Favrot, 21 La. Ann. 399 (1837); People's Savings Bank *v.* Wilcox, 15 R. I. 258, 3 Atl. 211 (1886), *contra*. And see Slate's Estate, 40 Ore. 349, 68 Pac. 399 (1902).

[91] 3 Mer. 547 (1817).

an administration suit, is fully protected.[92] The creditor, thus deprived of his right against the representative, still had a remedy against the legatees or distributees. In *Fletcher* v. *Stevenson*[93] the retention for possible future liability was put with good reason on the ground of a protection to the convenantee. But in a later case such retention was conceived to be for the benefit of the executor or administrator; and, as soon as it was held the decree of court protected him, the reason for the retention of assets seemed to disappear.[94] Accordingly it is the modern practice not to retain except in cases of leases where there is a privity between the executor and the lessor.[95]

Closely connected with the foregoing inquiry is the situation of an executor or administrator who pays legacies or distributive shares in ignorance of a present existing liability or of an obligation which may later mature. The law of England seems now clear that, unless the representative pays the beneficiaries under order of the court in an administration suit, he is liable to the creditor.[96] But if he secure the sanction of the court the creditor is without other remedy than to follow the assets in the hands of the legatees or distributees. This protection to the representative was a great inducement to him to resort to the Court of Chancery for an administration suit.[97] His position is further mitigated by Lord St. Leonard's Act,[98] allowing him after such notice as the Chancellor shall deem proper and the expiration of the time stated therein, to distribute the assets free from further molestation by indolent or belated creditors.

In the United States the question of presentation of claims is governed by statutes in general requiring the representative to give notice of his appointment and barring creditors who do not present their claims within a short period of limitation. The necessity of presenting contingent claims varies. The Massachusetts

[92] March *v.* Russell, 3 Myl. & Cr. 31 (1837); Knatchbull *v.* Fearnhead, 3 Myl. & Cr. 122 (1837); Waller *v.* Barrett, 24 Beav. 413 (1857).

[93] 3 Hare, 360 (1844).

[94] King *v.* Malcott, 9 Hare, 692 (1852); Dodson *v.* Sammell, 1 Dr. & Sm. 575 (1861).

[95] *In re* Nixon, [1904] 1 Ch. 638; *In re* King, [1907] 1 Ch. 72.

[96] Norman *v.* Baldry, 6 Sim. 621 (1834); March *v.* Russell, 3 Myl. & Cr. 31 (1837); Knatchbull *v.* Fearnhead, 3 Myl. & Cr. 122 (1837); Waller *v.* Barrett, 24 Beav. 413, 418 (1857).

[97] MAITLAND, EQUITY, 197.

[98] STAT. 22 & 23 VICT., c. 35, § 29.

Act [99] furnishes a reasonable solution. Three classes of debts are there defined. 1. Claims payable within the period of limitation. 2. Claims which with reasonable certainty will accrue thereafter. 3. Claims which may never become payable. A creditor whose right of action does not accrue within one year after giving the administration bond may present his claim at any time before final settlement, and, if the court find that the claim is or may become justly due, it shall order the representative to retain sufficient assets to satisfy it. The court has an option to take a suitable bond from those interested and pay over to them the assets. If such a claim is not so presented, all right to sue on it is lost both against the executor or administrator and legatees or distributees. Such a liability is a promissory note payable at a future date,[100] or a liability, which, though contingent, presents a fair chance of actual maturity.[101] On the other hand, the chance of holding the estate on the deceased's obligation as surety on a probate bond is so remote that it does not represent a claim which "is or may become justly due." It does not, therefore, require to be filed in court in order to save the rights of the creditor against the beneficiaries of the estate.[102] But of course there can be no claim against the executor personally if his final account has been allowed by the probate judge. This legislation protects the careful executor or administrator, and preserves the rights of the creditor so far as is consistent with not withholding too long the enjoyment of the property from those, who, after creditors, are entitled to it. The practice in Massachusetts has been followed more or less closely in some states.[103] In other jurisdictions every claim no matter how contingent must be presented within proper time or it is barred forever.[104] In Illinois

[99] REV. LAWS (1902), c. 141, §§ 9, 13, 26–32, as amended by ACTS (1914), c. 699.

[100] Bassett *v.* Drew, 176 Mass. 141, 57 N. E. 384 (1900).

[101] Electric Welding Co. *v.* Fitz, 215 Mass. 315, 102 N. E. 354 (1913).

[102] Forbes *v.* Harrington, 171 Mass. 386, 50 N. E. 641 (1898).

[103] MAINE, REV. STATS. (1903), c. 89, §§ 14–18; Greene *v.* Dyer, 32 Me. 460 (1851); Sampson *v.* Sampson, 63 Me. 328 (1874); Pole *v.* Simmons, 49 Md. 14 (1878); MICHIGAN, COMP. LAWS (1915), c. 234, §§ 20, 23, 25, 28; Berryhill *v.* Peabody, 72 Minn. 232, 75 N. W. 220 (1898); Lake Phalen Co. *v.* Lindeke, 66 Minn. 209, 68 N. W. 974 (1896); Hunt *v.* Burns, 90 Minn. 172, 95 N. W. 1110 (1903); NEBRASKA, REV. STATS. (1913), §§ 1409, 1412, 1413; Libby *v.* Hutchinson, 72 N. H. 190, 55 Atl. 547 (1903); OHIO, ANNOT. GEN. CODE (1912), §§ 10748, 10877–883; RHODE ISLAND, GEN. LAWS (1909), c. 318, §§ 19–25; VERMONT, PUB. STATS. (1906), c. 137, §§ 2912–20; WISCONSIN, STATS. (1915), §§ 3858–61, 3866–67; Schmidt *v.* Grinzow, 156 N. W. (Wis.) 143.

[104] ALASKA, CODES (1907), § 821; ARKANSAS, DIG. OF STATS. (1916), c. 1, § 110;

the statute is interpreted to mean that the claim is barred also against the legatees or distributees.[105] In some of these states it is expressly stated that the creditor is not barred if no notice was given by the personal representative, or if the creditor had no notice because he was out of the state.[106] In other of these states it will be seen that the construction of the statutes does not bar proceedings against beneficiaries who have been partially or wholly paid. In Connecticut,[107] Missouri [108] and North Carolina[109] the statute of non-claim runs from the maturity of the obligation.

II

With these preliminary observations on the necessity of presentment one may examine the nature of the obligation of a legatee, distributee, or creditor to refund for the benefit of other legatees, distributees, or creditors payments received. Refunding by a beneficiary when creditors have been overlooked may be had at the suit of the personal representative. After conflicting *dicta* in the latter part of the seventeenth century[110] it was squarely held in *Davis* v. *Davis*,[111] "that an executor may bring a bill against a legatee to refund a legacy voluntarily paid, as well as a creditor; for the executor paying a debt of the testator out of his own pocket stands in the place of the creditor and has the same equity against a legatee

---

ARIZONA, REV. STATS. (1913), CIV. CODE, §§ 882, 889; CAL. ANNOT. STATS. (1912), § 7996; FLORIDA, COMP. LAWS (1914), § 2405; GEORGIA, ANNOT. CODE (1914), § 3997; HAWAII, REV. LAWS (1915), § 2493; IDAHO, REV. CODES (1908), § 5462; ILLINOIS, ANNOT. STATS. (1913), § 119; MINNESOTA, GEN. STATS. (1913), § 7323; MONTANA, REV. CODES (1907), § 7760; NORTH DAKOTA, COMP. LAWS (1913), § 8736; OKLAHOMA, REV. LAWS (1910), § 6454; SOUTH DAKOTA, COMP. LAWS (1913), PROB. CODE, § 171; UTAH, COMP. LAWS (1907), § 3851; WASHINGTON, CODES & STATS. (1915), §§ 1472–79. Compare NEW JERSEY, COMP. STATS. (1910), § 3837; TENNESSEE, ANNOT. CODE (1917), § 4117.

[105] Cutright *v.* Stanford, 81 Ill. 240 (1876); People *v.* Brooks, 123 Ill. 246, 14 N. E. 39 (1887); Snydacker *v.* Swan Land Co., 154 Ill. 220, 40 N. E. 466 (1895).

[106] ARIZONA, REV. STATS. (1913), CIV. CODE, § 1023; CALIFORNIA, CODE CIV. PROC. (1916), § 1650; IDAHO, REV. CODE (1908), § 5631; MONTANA, REV. CODES (1907), § 7660; NORTH DAKOTA, COMP. LAWS (1913), § 8736; OKLAHOMA, REV. LAWS (1910), § 6454.

[107] Gay's Appeal, 61 Conn. 445, 23 Atl. 829 (1892).

[108] Burton *v.* Rutherford, 49 Mo. 255 (1872).

[109] Miller *v.* Shoaf, 110 N. C. 319, 14 S. E. 800 (1892).

[110] Hodges *v.* Waddington, 2 Vent. 360; Noell *v.* Robinson, 2 Vent. 358; Nelthrop *v.* Hill, 1 Ch. Cas. 135, 136.

[111] 8 Vin. Abr. pl. 35 (1718).

to compel him to refund." This case has been followed in two English decisions where the personal representative has paid the legatee with no notice of the debt, or, where, though aware of a possible liability, reasonably felt it to be so uncertain as not to warrant withholding from the legatee his due.[112] In these three cases the representative had not secured a decree protecting him in distribution, and had been obliged to pay the creditor out of his own pocket. *Alexander* v. *Fisher*[113] squarely follows the last two English cases, and the principle of the English law is recognized in *Stokes* v. *Goodykoontz*[114] and *Lewis* v. *Overby*.[115] In *Buchanan* v. *Pue*[116] the executor who was not blameworthy secured a refund even before he had paid creditors.[117] If the payment is made under a mistake of law, it would seem that generally recovery would not be allowed.[118] A few jurisdictions, which, with more reason, make no distinction between mistake of fact and mistake of law compel the beneficiary to disgorge.[119] In the United States the personal representative must have acted prudently in distributing the property or he will not be allowed to recover.[120]

---

[112] Jervis *v.* Wolferstan, L. R. 18 Eq. 18 (1874); Whittaker *v.* Kershaw, 45 Ch. D. 320 (1890).

[113] 18 Ala. 374 (1850).

[114] 126 Ind. 535, 26 N. E. 391 (1890).

[115] 31 Gratt. (Va.) 601, 622 (1879).

[116] 6 Gill. (Md.) 112 (1847).

[117] In the cases in which the representative has sued successfully it has generally appeared that he had already paid the creditor who had been overlooked. The language of several of the opinions assumes, however, that he could recover by way of exoneration as well as by way of reimbursement. See also Wolf *v.* Beaird, 123 Ill. 585, 15 N. E. 161 (1888); Morris *v.* Porter, 87 Me. 510, 33 Atl. 15 (1895); Walker *v.* Hill, 17 Mass. 380 (1821).

[118] Phillips *v.* McConica, 59 Ohio St. 1, 51 N. E. 445 (1898); Scott *v.* Ford, 52 Oreg. 288, 97 Pac. 99 (1908); Shriver *v.* Garrison, 30 W. Va. 456, 4 S. E. 660 (1887); Rogers *v.* Ingham, 3 Ch. D. 351 (1876).

[119] See Northrop *v.* Graves, 19 Conn. 548 (1849); Culbreath *v.* Culbreath, 7 Ga. 64 (1849). Compare Prince de Bearn *v.* Winans, 111 Md. 434, 74 Atl. 626 (1909); Livesey *v.* Livesey, 3 Russ. 287 (1827); Dibbs *v.* Goren, 11 Beav. 483 (1849).

[120] See Clifton *v.* Clifton, 54 Fla. 535, 45 So. 458 (1907); Clark *v.* Truslow, 161 App. Div. 675, 146 N. Y. Supp. 750 (1914); Donnell *v.* Cooke, 63 N. C. 227 (1869); Clark *v.* Williams, 70 N. C. 679 (1874); McEndree *v.* Morgan, 31 W. Va. 521, 531, 8 S. E. 285 (1888). See Harris *v.* White, 2 South (N. J.) 422 (1819); Edgar *v.* Shields, 1 Grant (Pa.) 361 (1856). But compare Atwood *v.* Lester, 20 R. I. 660, 40 Atl. 866 (1898); Wetmore *v.* Porter, 92 N. Y. 76 (1883). And in the case of a trust, the trustee guilty of a conscious breach of trust, may without joining the *cestui que trust* bring a bill in equity against the transferee to set aside the transfer and recover the *res*. Franco

Of course the representative, who, even *bonâ fide*, pays legacies without protection of a court order, is liable to creditors for a *devastavit*, if the assets later prove insufficient to meet their demands.[121] Do the creditors also have a direct right against the legatees who have received more than their equitable share? This liability of beneficiaries was early settled in the English law.[122] And it is not necessary to-day to join the personal representative.[123] Furthermore the right of the creditor is inferentially recognized in Lord St. Leonard's Act (1859).[124] In the United States the right of the belated creditor to proceed directly against the legatee or distributee is clearly settled, unless as in Illinois the statute of presentment in terms or by construction bars him.[125] There is clearly a right in equity, as many of the foregoing decisions show. The suit was at law in *McClure* v. *Dee*, *supra*; *Rohrbaugh* v. *Hamblin*, *supra*; *Johnson* v. *Libby*, *supra*; *South Milwaukee Co.* v. *Murphy*, *supra*. An action at law was denied in *Hendricks* v. *Keeser*.[126]

The right of the creditor to proceed directly against the benefi-

v. Franco, 3 Ves. Jr. 75 (1796); Greenwood *v.* Wakeford, 1 Beav. 576 (1839); Robinson *v.* Evans, 7 Jur. 738 (1843); Baynard *v.* Woolley, 20 Beav. 583 (1855); Carson *v.* Sloane, L. R. 13 Ir. 139 (1884); Zimmerman *v.* Kinkle, 108 N. Y. 282, 15 N. E. 407 (1888); Abbott *v.* Reeves, 49 Pa. 494 (1865); Mansfield *v.* Wardlow, 91 S. W. 859 (Tex. Civ. App.) (1905).

[121] 2 WILLIAMS, EXECUTORS, 10 ed., 1078, 1436; Knatchbull *v.* Fearnhead, 3 Myl. & Cr. 122 (1837); Clegg *v.* Rowland, L. R. 3 Eq. 368 (1866).

[122] Anon., 1 Vern. 162 (1683); Hodges *v.* Waddington, 2 Vent. 360 (1795); Gillespie *v.* Alexander, 3 Russ. Ch. 130, 136, 137 (1826); March *v.* Russell, 3 Myl. & Cr. 31 (1837); *In re* Eustace, [1912] 1 Ch. 561.

[123] Hunter *v.* Young, 4 Exch. D. 256 (1879).

[124] STAT. 22 & 23 VICT., c. 35, § 29.

[125] Hall *v.* Brewer, 40 Ark. 433 (1883); Gibson *v.* Mitchell, 16 Fla. 519 (1878); Blair *v.* Allen, 55 Ind. 409 (1876); Stevens *v.* Tucker, 87 Ind. 109 (1882); Security Fire Ins. Co. *v.* Hansen, 104 Iowa, 264, 73 N. W. 596 (1897); McClure *v.* Dee, 115 Iowa, 546, 88 N. W. 1093 (1902); Rohrbaugh *v.* Hamblin, 57 Kan. 393, 46 Pac. 705 (1896); Johnson *v.* Libby, 111 Me. 204, 88 Atl. 647 (1913); Forbes *v.* Harrington, 171 Mass. 386, 50 N. E. 641 (1898); Hantzch *v.* Massolt, 61 Minn. 361, 63 N. W. 1069 (1895); Walker *v.* Deaver, 79 Mo. 664 (1883); Hall *v.* Martin, 46 N. H. 337 (1865); Chitty *v.* Gillett, 46 Okla. 724, 148 Pac. 1048 (1915); South Milwaukee Co. *v.* Murphy, 112 Wis. 614, 88 N. W. 583 (1908).

In some states the right of the creditor is recognized by statute, see ALABAMA, CODE (1907), § 2785; INDIANA, ANNOT. STATS. (1914), §§ 2831–32; MASSACHUSETTS, REV. LAWS (1902), c. 135, § 27; Acts (1914), c. 699; MICHIGAN, COMP. LAWS (1915), c. 234, c. 56, § 20; NEBRASKA, REV. STATS. (1913), § 1409; OHIO, ANNOT. GEN. CODE, §§ 10748, 10877–883; RHODE ISLAND, GEN. LAWS (1909), c. 318, §§ 19–25; VERMONT, PUB. STATS. (1906), c. 137, § 2915; WISCONSIN, STATS. (1915), § 3861.

[126] 32 Ark. 714 (1878).

ciary seems entirely defensible both at law or in equity, despite his alternative right to hold the personal representative for a *devastavit*.[127] The legatee holds without consideration what is equitably due the creditor; he is unjustly enriched at the latter's expense. This right, too, should be the only way of enforcing the interest of the creditor. To allow the personal representative to recover for the person best entitled and a second action by the latter against the representative is circuitous. The executor's or administrator's right should exist only when he has been obliged to make the creditor whole, and is, therefore, the real party in interest. And when he is the real party in interest the representative should secure a refund, unless, indeed, he has paid with conscious disregard of a claim due and payable or reasonably sure to become payable. No equitable or quasi-contractual principle allows recovery where such a flagrant violation of duty occurs. So far as his interest is concerned he has made in effect a pure gift, though of course this cannot prejudice the creditor's direct right against the overpaid beneficiary. Yet if the plaintiff has been merely negligent, he should recover both in equity and at law. The defendant has something for which he has paid nothing, and which after the plaintiff has been mulcted by the creditor for *devastavit* equitably belongs to the representative. If the creditor's right is unknown to the personal representative at the time of payment, the situation is analogous to those cases where money paid under a mistake of a present existing fact may be recovered.[128] If payment is made when the existence of a contingent claim is known, but is thought too doubtful of maturity to be regarded, the creditor should nevertheless recover. It is as inequitable for the beneficiary to keep the money when he has received it under an erroneous impression as to the future, as where a mutual mistake as to the present has induced the payment.[129] The liability at law is in the common

[127] See the analogous case of *cestui que trust's* remedy against donee of trust *res*. PERRY, TRUSTS, 6 ed., §§ 217, 225, 346, 828; AMES, LECTURES ON LEGAL HISTORY, 255; 27 COL. L. REV. 283.

[128] KEENER, QUASI CONTRACTS, c. 2.

[129] Compare cases where one party has been allowed to recover money paid under a contract in return for a promise which the other party has wholly failed to perform. Towers *v.* Barrett, 1 T. R. 133 (1786); Squire *v.* Tod, 1 Camp. 293 (1808); Nash *v.* Towne, 5 Wall. (U. S.) 689 (1866); Janulewycz *v.* Quagliano, 88 Conn. 60, 89 Atl. 897 (1914); Trenkle *v.* Reeves, 25 Ill. 214 (1860); Lodi *v.* Goyette, 219 Mass. 72, 106 N. E. 1012 (1914); Vallentyne *v.* Immigration, 95 Minn. 195, 103 N. W. 1028 (1905);

counts, and is purely quasi contractual. According to principles of quasi contracts negligence of the plaintiff is no defense.[130] The same rule should apply in equity, though here the authorities are not so clear that negligence of the plaintiff does not bar him.[131]

III

The law of both countries is more favorable to the defendant when refund is demanded of a beneficiary to reimburse a legatee or distributee who has not received his due. If the executor or administrator sues, he cannot recover if he paid voluntarily —not under compulsion of suit. The distinction is not taken between cases where he pays under a misapprehension as to the existence of other beneficiaries or as to the size of the fund at his disposal on the one hand, and where on the other hand he disburses with full knowledge of law and facts. As some judges put it, whenever an executor pays a legacy the presumption is that he has sufficient assets to pay all.[132] In *Montgomery's Appeal*,[133] the court, in a case where the executor sought a refund for creditors, said:

"When an administrator pays out money, he is presumed to know the condition of the estate. The assets are in his hands, and he is familiar

---

Brokaw *v.* Duffy, 165 N. Y. 391, 59 N. E. 196 (1901); Ohio Trust Co. *v.* Allison, 243 Pa. 201, 89 Atl. 1137 (1914).

And cases where the defendant has been compelled to restore what he has received upon his repudiation of the contract though he has not actually failed to perform it. Drake *v.* Goree, 22 Ala. 409 (1853); Smith *v.* Jaccard, 20 Cal. App. 280, 128 Pac. 1023 (1912); Ryan *v.* Dayton, 25 Conn. 188 (1856); Elder *v.* Chapman, 176 Ill. 142, 52 N. E. 10 (1898).

And cases where after partial or complete performance on the part of the plaintiff he has been allowed to recover what he has parted with upon the defendant's performance becoming excusably impossible. The Allanwilde, 247 Fed. 236 (1917); Bibb *v.* Hunter, 2 Duv. (Ky.) 494 (1866); Butterfield *v.* Byron, 153 Mass. 517, 27 N. E. 667 (1891); Joyce *v.* Adams, 8 N. Y. 291 (1853); Williams *v.* Allen, 10 Hump. (Tenn.) 337 (1849); Logan *v.* Le Mesurier, 6 Moo. P. C. 116 (1847); Krell *v.* Henry, 18 T. L. Rep. 823 (1902); Lumsden *v.* Barton, 19 T. L. Rep. 53 (1902) (*semble*). Compare Alfred Marks Realty Co. *v.* Hotel Hermitage, 156 N. Y. Supp. 179 (1915).

[130] Kelly *v.* Solari, 9 M. & W. 54 (1841); Appleton Bank *v.* McGilvray, 4 Gray (Mass.) 518 (1855). See *infra*, page 340.

[131] 2 POMEROY, EQUITABLE JURISDICTION, § 856.

[132] Newman *v.* Barton, 2 Vern. 205 (1690); Orr *v.* Kaines, 2 Ves. Sr. 194 (1750–51); Coppin *v.* Coppin, 2 P. Wms. 291, 296 (1725). See Davis *v.* Newman, 2 Rob. (Va.) 664 (1844). But compare Gallego *v.* Atty. Gen., 3 Leigh (Va.) 450, 488 (1832); Northrop *v.* Graves, 19 Conn. 548 (1849); Culbreath *v.* Culbreath, 7 Ga. 64 (1849).

[133] 92 Pa. 202, 206 (1879).

with their amount and value. He ought to know, and is chargeable with knowledge, of the amount of claims against the estate when he makes a payment on account of a distributive share. It would be a great hardship upon distributees, to whom an administrator has voluntarily made payments on account of their shares, if they may be called upon for repayment after lapse of years. They may have spent it, or increased their style of living in entire good faith, and in ignorance of any overpayment."

Here it is not clear whether the court rests its decision on the "voluntary" character of the payment or on change of position of the defendant. If, however, the executor paid under compulsion of suit, the English law allowed him to recover for the benefit of other legatees.[134]

The legatee or distributee who sued the overpaid beneficiary neither in England nor this country had as easy a path as the claimant who was a creditor. The beneficiary must first exhaust the personal representative. If the latter had protected himself by paying under order of court or was insolvent, the beneficiary, provided the assets were originally insufficient to pay his legacy, had indeed a right to demand relief.[135] But if the assets, originally sufficient, had after payment to the defendant been accidentally destroyed, or wasted by the personal representative, the belated beneficiary had no remedy against the more diligent.[136]

The use of the term "voluntary" is unfortunate and misleading. The personal representative is in just as unfortunate a position whether he pays without compulsion of suit or at the end of a judgment. If "voluntary" means a payment, when all the facts are before the payer and the right of the other beneficiaries than the one paid is clear, the result is well enough. There is in effect a pure gift. While the payer cannot then cut off without their consent the defrauded legatees or distributees, he loses his right to

[134] Newman *v.* Barton, 2 Vern. 205 (1690); Orr *v.* Kaines, 2 Ves. Sr. 194 (1750); Noell *v.* Robinson, 2 Vent. 358 (*semble*); Davis *v.* Newman, 2 Rob. (Va.) 664 (1844) (*semble*).

[135] Anon., 1 P. Wms. 495 (1718); Walcott *v.* Hall, 1 P. Wms. 495 *n* (*semble*); Lupton *v.* Lupton, 2 Johns. Ch. (N. Y.) 614 (1817); Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501 (1888); Uffner *v.* Lewis, 27 Ont. App. 242 (1900).

[136] Walcott *v.* Hall, 1 P. Wms. 495 *n*; Fenwick *v.* Clarke, 31 L. J. Ch. 728 (1862); Peterson *v.* Peterson, L. R. 3 Eq. 111 (1866); Lupton *v.* Lupton, 2 Johns. Ch. (N. Y.) 614 (1817); Story, Equity Jurisprudence, § 92. But see Wallace *v.* Latham, 52 Miss. 291 (1876); Buffalo Trust Co. *v.* Leonard, 154 N. Y. 141, 47 N. E. 966 (1897).

reimbursement if they choose to charge him. But grammatically a payment made under a mistake of fact is a voluntary payment, and yet of course money so paid can be recovered. The words "involuntary" and "voluntary" have been often used by judges as a test of recovery quasi contractually, and have caused endless confusion.[137] The word "voluntary" furnishes no accurate guide for nonrecovery. As Baron Martin said of an overpayment of fees to a parish clerk for extracts made from the register of burials and baptisms, "this is more like the case of money paid without consideration — to call it a voluntary payment is an abuse of language."[138] In Pollock on Contracts,[139] the learned author remarks of money paid under circumstances of compulsion:

"But in all these cases the foundation of the right to recover back the money is not the involuntary character of the payment in itself, but the fact that the party receiving it did no more than he was bound to do already, or something for which it was unlawful to take money if he chose to do it, though he had his choice in the first instance. Such payments are then regarded as made without consideration. The legal effect of their being practically involuntary, though important, comes in the second place: the circumstances explain and excuse the conduct of the party making the payment. Similarly in the kindred case of a payment under mistake the actual foundation of the right is the failure of consideration, and ignorance of material facts accounts for the payment being made."

There seems no reason why the right of the personal representative here should not be the same as where a creditor, not a legatee or distributee, has been overlooked.

If a legatee or distributee is suing the beneficiary directly his right is more restricted than the creditor in two respects. First, it is stated that he must first exhaust the personal representative, unless perhaps the latter is insolvent.[140] For this there seems no adequate reason. The unsatisfied legatee or beneficiary, is just as much entitled to sue directly as the unsatisfied creditor. The

[137] See Brown *v.* McKinally, 1 Esp. 64 (1795); Heiserman *v.* Burlington Ry. Co., 63 Iowa, 732, 18 N. W. 903 (1884); Ill. Glass Co. *v.* Chicago Tel. Co., 234 Ill. 535, 85 N. E. 200 (1908); 3 ILL. L. REV. 235.

[138] Steele *v.* Williams, 8 Exch. 625, 632 (1853).

[139] 3 Am. ed. 732.

[140] Orr *v.* Kaines, 2 Ves. Sr. 194 (1750); 1 ROPER, LEGACIES, 3 ed., 399. See Miller *v.* Stark, 29 S. C. 325, 7 S. E. 501 (1888).

unjust enrichment of the beneficiary is as clear in one case as in the other. The distinction is simply indefensible. Second, if the assets were originally sufficient to satisfy all legacies, but were subsequently wasted by act of the personal representative or otherwise, the legatee already paid may keep. The reason commonly given is that a dilatory beneficiary should not prejudice a more diligent who may have spent the bounty. If this means anything, it represents a combination of the defenses of laches and change of position. It is a sufficient answer to say that if there has been change of position by the defendant before notice in any of the cases where a refund is demanded it should be a complete defense both at law or in equity.[141] But what of the many cases where there has been no change of position? The laches of the plaintiff should then not bar him. The defendant, if he disgorge what he has received or its equivalent, suffers no loss, for he has merely given up that which he has been holding without consideration and which would have gone to another had it not been for his windfall. Other decisions are put on the ground that the satisfied beneficiary has received no more than what was due him.[142] But until every beneficiary is paid his share, it is only fair that each should bear proportionately the loss caused by depreciation of assets in the hands of the representative due to causes to which they are not parties.

IV

If an executor or administrator sues an overpaid creditor where the assets have unexpectedly proved deficient for the payment of creditors, he may recover.[143] No case has been found where an unsatisfied creditor proceeded against an overpaid creditor. But upon principles considered above the right should exist.

---

[141] See *infra*, page 344.

[142] Lupton *v.* Lupton, 2 Johns. Ch. (N. Y.) 614, 626 (1817); Walcott *v.* Hall, 1 P. Wms. 495, note.

[143] Mansfield *v.* Lynch, 59 Conn. 320, 22 Atl. 313 (1890) (*semble*); Wolf *v.* Beaird, 123 Ill. 585, 15 N. E. 161 (1888); East *v.* Ferguson, 59 Ind. 169 (1877); Tarplee *v.* Capp, 25 Ind. App. 56, 56 N. E. 270 (1900) (but see Beardsley *v.* Marsteller, 120 Ind. 319, 22 N. E. 315 (1889)); Morris *v.* Porter, 87 Me. 510, 33 Atl. 15 (1895); Walker *v.* Hill, 17 Mass. 380 (1821); Heard *v.* Drake, 4 Gray (Mass.) 514 (1855); Woodruff *v.* Claflin Co., 198 N. Y. 470, 91 N. E. 1103 (1910); Rogers *v.* Weaver, 5 Ohio, 536 (1832); Thorsen *v.* Hooper, 57 Oreg. 75, 109 Pac. 388 (1910). Carson *v.* M'Farland, 2 Rawle (Pa.) 118 (1828); Findlay *v.* Trigg, 83 Va. 539, 3 S. E. 401 (1887); Staples *v.* Staples, 85 Va. 76, 7 S. E. 197 (1888), *contra*.

V

It remains to consider certain principles affecting all situations hitherto dealt with in refunding.

Negligence, or laches of the plaintiff in itself, unaccompanied by other circumstances such as change of position of defendant, in England properly constitutes no defense.[144] The American law is not so clear.[145] In other branches of the law of mistake it is often remarked that negligence or at least gross negligence will bar the plaintiff.[146] But Pomeroy says that each instance of negligence must depend on its own circumstances; and that even a clearly established negligence may not be ground for refusing relief if the other party is not prejudiced thereby.[147] And this statement has been quoted with approval or similar statements made in the cases.[148] At law in cases of mistake it is clear that negligence without more does not prejudice the plaintiff.[149] Generally delay in ap-

[144] Ridgway *v.* Newstead, 3 De G. F. & J. 474 (1861); Blake *v.* Gale, 32 Ch. D. 571 (1886). *In re* Eustace, [1912] 1 Ch. 561.

[145] In Wallace *v.* Swepston, 74 Ark. 520, 528, 86 S. W. 398 (1905), the unpaid creditor failed because "After this long lapse of time and the changes in the status of the parties, it seems to us to be inequitable to permit appellee to disturb the heirs." Here change of position seems to have influenced the decision as much as delay. But see Wilson *v.* Smith, 117 Fed. 707 (Pa.) (1902).

[146] Duke of Beaufort *v.* Neeld, 12 Cl. & F. 248, 286 (1845); Leuty *v.* Hillas, 2 De G. & J. 110 (1858); Besley *v.* Besley, L. R. 9 Ch. D. 103 (1878); Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 475 (1902); Citizen's Bank *v.* Judy, 146 Ind. 322, 43 N. E. 259 (1896); Diman *v.* Providence R. R., 5 R. I. 130 (1858); Voorhis *v.* Murphy, 26 N. J. Eq. 434 (1875); Dillett *v.* Kemble, 25 N. J. Eq. 66 (1874); Wood *v.* Patterson, 4 Md. Ch. 335 (1850); Capehart *v.* Mhoon, 5 Jones Eq. 178 (1859); Lewis *v.* Lewis, 5 Ore. 169 (1874).

[147] 2 POMEROY, EQ. JURIS., 3 ed., § 856.

[148] Bush *v.* Bush, 33 Kan. 556, 563; Kinney *v.* Ensminger, 87 Ala. 340, 6 So. 72 (1888); Seeley *v.* Bacon, 34 Atl. (N. J.) 139 (1896); Collignon *v.* Collignon, 52 N. J. Eq. 516, 28 Atl. 794 (1894); Southern F. & W. Co. *v.* Ozment, 132 N. C. 839, 44 S. E. 683 (1903); Powell *v.* Heisler, 16 Ore. 412, 19 Pac. 109 (1888); San Antonio Nat. Bank *v.* McLane, 96 Tex. 48, 70 S. W. 201 (1902).

[149] Kelly *v.* Solari, 9 M. & W. 54 (1841); Townsend *v.* Crowdy, 8 C. B. (N. S.) 477 (1860); Brown *v.* Tillinghast, 84 Fed. 71 (1897); Merrill *v.* Brantly, 133 Ala. 537, 31 So. 847 (1901); Devine *v.* Edwards, 101 Ill. 138 (1881); Brown *v.* College Road Co., 56 Ind. 110 (1877); Fraker *v.* Little, 24 Kan. 598 (1880); First Nat. Bank *v.* Behan, 91 Ky. 560, 16 S. W. 368 (1891); Baltimore R. R. Co. *v.* Faunce, 6 Gill (Md.) 68 (1847); Pingree *v.* Mutual Gas Co., 107 Mich. 156, 65 N. W. 6 (1895); Koontz *v.* Central Nat. Bank, 51 Mo. 275 (1873); Bone *v.* Friday, 180 Mo. App. 577, 167 S. W. 599 (1914); Douglas County *v.* Keller, 43 Neb. 635, 62 N. W. 60 (1895); Waite *v.* Leggett, 8 Cow. (N. Y.) 195 (1828); Hathaway *v.* County of Delaware, 185 N. Y. 368, 370, 78 N. E. 153 (1906); Simms *v.* Vick, 151 N. C. 78, 65 S. E. 621 (1909); James River Bank *v.*

plication for relief from error is a defense only if it is accompanied by circumstances prejudicing the defendant.[150] It is often said that the right to set aside a fraudulent bargain must be exercised with reasonable promptness after discovery of the fraud.[151] But "the question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind, the immediate consideration being whether the period has been long enough to result in prejudice to the defendant."[152] The

---

Weber, 19 N. D. 702, 124 N. W. 952 (1910); McKibben *v.* Doyle, 173 Pa. 579, 34 Atl. 455 (1896); City Nat. Bank *v.* Peed, 32 S. E. 34 (Va.) (1899). But see Grymes *v.* Sanders, 93 U. S. 55 (1876); Stanley Rule Co. *v.* Bailey, 45 Conn. 464 (1878); Norton *v.* Marden, 15 Me. 45 (1838); Ash *v.* McLellan, 101 Me. 17, 62 Atl. 598 (1905); Wheeler *v.* Hathaway, 58 Mich. 77, 24 N. W. 780 (1885); Brummitt *v.* McGuire, 107 N. C. 351, 12 S. E. 191 (1890); First Nat. Bank *v.* Taylor, 122 N. C. 569, 29 S. E. 831 (1898); Simmons *v.* Looney, 41 W. Va. 738, 24 S. E. 677 (1896).

[150] Newman *v.* Milner, 2 Ves. Jr. 483 (1794); Grymes *v.* Sanders, 93 U. S. 55 (1876); Kinney *v.* Consolidated Virginia Min. Co., 4 Sawyer (U. S. C. C.) 382 (1877); Paulison *v.* Van Iderstine, 28 N. J. Eq. 306 (1877); Holt *v.* Ruleau, 102 Atl. 934 (Vt.) (1918); Sable *v.* Maloney, 48 Wis. 331, 4 N. W. 479 (1880); Van Brunt *v.* Ferguson, 163 Wis. 540, 158 N. W. 295 (1916).

[151] Clough *v.* London, etc. Ry. Co., L. R. 7 Exch. 26 (1871); Upton *v.* Tribilcock, 91 U. S. 45 (1875); Pence *v.* Langdon, 99 U. S. 578 (1878); Mudsill Mining Co. *v.* Watrous, 61 Fed. 163 (1894); Blank *v.* Aronson, 187 Fed. 241 (1911); Bowden *v.* Spellman, 59, Ark. 251, 27 S. W. 602 (1894); Board of Water Comm'rs *v.* Robbins, 82 Conn. 623, 74 Atl. 938 (1909); Cedar Rapids Ins. Co. *v.* Butler, 83 Iowa, 124, 129, 48 N. W. 1026 (1891); Nichols & Shepard Co. *v.* Wheeler, 150 Ky. 169, 150 S. W. 33 (1912); Byrd *v.* Rautman, 85 Md. 414, 36 Atl. 1099 (1897); Boles *v.* Merrill, 173 Mass. 491, 53 N. E. 894 (1899); Barnard *v.* Campbell, 58 N. Y. 73 (1874); Ditton *v.* Purcell, 21 N. Dak. 648, 132 N. W. 347 (1911); Robinson *v.* Roberts, 20 Okla. 787, 95 Pac. 246 (1908); Koehler *v.* Dennison, 72 Ore. 362, 143 Pac. 649 (1914).

[152] Brown *v.* Young, 62 Ind. App. 364, 374 (1916). And see Basye *v.* Paola Refining Co., 79 Kan. 755, 101 Pac. 658 (1909); Armstrong *v.* Jackson, [1917] 2 K. B. 822, 830. In Roberts *v.* James, 83 N. J. L. 492, 495, 496, 85 Atl. 244 (1912), Judge Swayze said: "It is also settled that one who desires to rescind a contract, must act within a reasonable time. Dennis *v.* Jones, 17 Stew. Eq. 513; Clampitt *v.* Doyle, 3 Buch. 678. What is a reasonable time necessarily depends on the circumstances of each particular case. It is settled in the English courts that unless the situation of the other party has changed to his detriment, the contract continues until the party defrauded elects to avoid it, and he may keep the question open as long as he does nothing to affirm the contract. Clough *v.* London and Northwestern Railway (1871), L. R. 7 Ex. 26, 41 L. J. Exch. 17; Morrison *v.* Universal Marine Insurance Co. (1873), L. R. 8 Ex. 197, 42 L. J. Exch. 115; United Shoe Machinery Co. of Canada *v.* Brunet (1909), A. C. 330. He may even wait until action is brought against him (Clough *v.* London and Northwestern Railway, *ubi supra*), and a plea setting up the fraud amounts to a rescission of the contract. Lawton *v.* Elmore, 27 L. J. Ex. 141; Dawes *v.* Harness, L. R. 10 C. P. 166, 44 L. J. C. P. 194; Aaron's Reefs *v.* Twiss (1896), A. C. 273, 65 L. J. P. C. 54. The case last cited was an action by a company against

right to rescind a contract for repudiation or substantial breach by the other contracting party is frequently stated to depend upon its exercise without undue delay.[153] It has been pointed out, however, that in many of these cases the facts show that the inaction of the plaintiff may be interpreted as election.[154] There is no more reason why delay, pure and simple, should furnish a defense here than where the basis of rescission is mutual mistake. Indeed less consideration should be shown the defendant who repudiates or breaks his promise than him who has innocently and inadvertently received what equitably belongs to another. Many jurisdictions, doubtless to promote the marketability of realty, require an infant who has executed a deed of land to disaffirm promptly on arriving at majority.[155] An equal number, with more

a shareholder for calls upon his stock. In such cases the right of creditors and other stockholders to have the stock paid for requires a prompt disaffirmance of the subscription to stock; but inasmuch as in the case before the court, the rights of creditors and other stockholders were not involved, it was held enough to set up the fraud by way of defence when action was brought. . . ." "In the case of an executory contract, a refusal to perform any obligation thereunder and the defence of an action brought thereon are all that the defrauded party can do by way of asserting his right to disaffirm the contract, and unless his silence or delay has operated to the prejudice of the other party, he may first assert his right when his adversary first asserts his claim by action."

[153] Collins *v.* Tigner, 5 Pen. (Del.) 345 (1905); Mizell *v.* Watson, 57 Fla. 111, 49 So. 149 (1909); Harden *v.* Lang, 110 Ga. 392, 395, 36 S. E. 100 (1900); Carney *v.* Newberry, 24 Ill. 203 (1860); Axtel *v.* Chase, 77 Ind. 74 (1881), 83 Ind. 546 (1882); Mills *v.* Osawatomie, 59 Kan. 463, 53 Pac. 470 (1898); World Pub. Co. *v.* Hull, 81 Mo. App. 277 (1899); Alfree Mfg. Co. *v.* Grape, 59 Neb. 777, 82 N. W. 11 (1900); Lawrence *v.* Dale, 3 Johns. Ch. (N. Y.) 23 (1817); Caswell *v.* Black River Mfg. Co., 14 Johns (N. Y.) 453 (1817); NORTH DAKOTA, CIV. CODE (1913), § 5936; OKLAHOMA, STATS. (1910), § 986; Thomas *v.* McCue, 19 Wash. 287, 53 Pac. 161 (1898).

[154] "In most of them, either the plaintiff had received something from the defendant under the contract, or the contract was of such a nature that unless promptly informed the defendant would naturally proceed with his performance. Under such circumstances . . . an action may well be interpreted as an election not to seek restitution. Hence the statement that unless notice is promptly given restitution will not be enforced." WOODWARD, QUASI CONTRACTS, § 267.

[155] Hastings *v.* Dollarhide, 24 Cal. 195 (1864); Kline *v.* Beebe, 6 Conn. 494 (1827); Wallace *v.* Lewis, 4 Harr. (Del.) 75 (1843); Nathans *v.* Arkwright, 66 Ga. 179 (1886); Bentley *v.* Greer, 100 Ga. 35, 27 S. E. 974 (1896); Hogan *v.* Utter, 95 S. E. 565 (N. C.) (1918); Cole *v.* Pennoyer, 14 Ill. 158 (1852); Blankenship *v.* Stout, 25 Ill. 132 (1860); Keil *v.* Healey, 84 Ill. 104 (1876); Tunison *v.* Chamblin, 88 Ill. 378 (1878); Hartman *v.* Kendall, 4 Ind. 403 (1853); Scranton *v.* Stewart, 52 Ind. 68 (1875); Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475 (1903) (but see Sims *v.* Bardoner, 87 Ind. 94 (1882)); IOWA, CODE (1897), § 3189; Goodnow *v.* Empire Lumber Co., 31 Minn. 468, 18 N. W. 283 (1884); Ward *v.* Laverty, 19 Neb. 429, 27 N. W. 393 (1886); O'Brien

logic, allow him to avoid the transfer at any time before the statute of limitations has run after he has attained full age,[156] unless there are circumstances showing estoppel, promissory estoppel, or change

v. Gaslin, 20 Neb. 347, 30 N. W. 274 (1886); Englebert *v.* Troxell, 40 Neb. 195, 58 N. W. 852 (1894); Criswell *v.* Criswell, 163 N. W. 302 (Neb.) (1917); Weeks *v.* Wilkins, 134 N. C. 516, 47 S. E. 24 (1904); Gaskins *v.* Allen, 137 N. C. 426, 49 S. E. 919 (1905); Dolph *v.* Hand, 156 Pa. 91, 27 Atl. 114 (1893); Scott *v.* Buchanan, 11 Humph. (Tenn.) 468 (1850); Bingham *v.* Barley, 55 Tex. 281 (1881); Ferguson *v.* Houston Ry. Co., 73 Tex. 344, 11 S. W. 347 (1889); Bigelow *v.* Kinney, 3 Vt. 353 (1830); Richardson *v.* Boright, 9 Vt. 368 (1837); WASHINGTON, CODES & STATS. (1915), § 5293; Featherston *v.* McDonell, 15 U. C. C. P. 162 (1865); Foley *v.* Canada Loan Co., 4 Ont. 38 (1883). The same rule was applied to a transfer of personalty by an infant. Hastings *v.* Dollarhide, 24 Cal. 195 (1864); IOWA, CODE (1897), § 3189; Gannon *v.* Manning, 42 App. D. C. 206 (1914); Baker *v.* Kennett, 54 Mo. 82 (1873); Summers *v.* Wilson, 2 Cold. (Tenn.) 469 (1865); WASHINGTON, CODE & STATS. (1915), § 5293. See Parsons *v.* Teller, 188 N. Y. 318, 326, 80 N. E. 930 (1907); Woolridge *v.* Lavoie, 104 Atl. 346 (N. H.) (1918). And to the executory contract of a minor. Johnson *v.* Storie, 32 Neb. 610, 49 N. W. 371 (1891) (surety on note); Chandler *v.* Jones, 173 N. C. 427, 92 S. E. 145 (1917). See Darlington *v.* Hamilton Bank, 116 N. Y. Supp. 678 (1909) note; Holmes *v.* Blogg, 8 Taunt. 35 (1817); Edwards *v.* Carter, [1893] A. C. 360; Carnell *v.* Harrison, [1916] 1 Ch. 328.

[156] Wells *v.* Seixas, 24 Fed. 82 (1885); Gilkinson *v.* Miller, 74 Fed. 131 (1896); Tucker *v.* Moreland, 10 Pet. (U. S.) 58, 75 (1836) (*semble*); Irvine *v.* Irvine, 9 Wall. (U. S.) 617 (1869); Sims *v.* Everhardt, 102 U. S. 300 (1880); McCarthy *v.* Nicrosi, 72 Ala. 332 (1882) (but see Schaffer *v.* Lauretta, 57 Ala. 14 (1876)); Putnal *v.* Walker, 61 Fla. 720, 55 So. 844 (1911); Syck *v.* Hellier, 140 Ky. 388, 131 S. W. 30 (1910). Compare Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447 (1888). But see Justice *v.* Justice, 170 Ky. 423, 426, 186 S. W. 148 (1916); Boody *v.* McKenney, 23 Me. 517, 523, 524 (1844) (*semble*); Davis *v.* Dudley, 70 Me. 236 (1879); Prout *v.* Wiley, 28 Mich. 164 (1873); Donovan *v.* Ward, 100 Mich. 601, 59 N. W. 254 (1894); Wallace *v.* Latham, 52 Miss. 291 (1876); Allen *v.* Poole, 54 Miss. 323 (1877); Shipp *v.* McKee, 80 Miss. 741, 31 So. 197 (1902) (but see Thompson *v.* Strickland, 52 Miss. 574 (1876)); Brantley *v.* Wolf, 60 Miss. 420 (1882); Peterson *v.* Laik, 24 Mo. 541 (1857); Thomas *v.* Pullis, 56 Mo. 211 (1874); Lacy *v.* Pixler, 120 Mo. 383, 25 S. W. 206 (1894); Linville *v.* Greer, 165 Mo. 380, 65 S. W. 579 (1901); Parrish *v.* Treadway, 267 Mo. 91, 183 S. W. 580 (1916); Jackson *v.* Carpenter, 11 Johns. (N. Y.) 539, 542 (1814); Voorhies *v.* Voorhies, 24 Barb. (N. Y.) 150 (1857); Eagan *v.* Scully, 51 N. Y. Supp. 680 (1898), aff'd 173 N. Y. 581, 65 N. E. 1116 (1902); Green *v.* Green, 69 N. Y. 553 (1877) (but see Jones *v.* Butler, 30 Barb. 641 (1859)); Drake *v.* Ramsay, 5 Ohio, 252 (1831). Cresinger *v.* Welch, 15 Ohio, 156 (1846); Lanning *v.* Brown, 84 Ohio St. 385 (1911); Wilson *v.* Branch, 77 Va. 65 (1883); Birch *v.* Linton, 78 Va. 584 (1884); Gillespie *v.* Bailey, 12 W. Va. 70 (1877).

The same rule was applied in the case of a transfer of personalty by a minor. Vaughan *v.* Parr, 20 Ark. 600 (1859); Hill *v.* Nelms, 86 Ala. 442, 5 So. 796 (1888). See Boody *v.* McKenney, 23 Me. 517, 525 (1884). And the same is true of an infant's executory contract. Buzzell *v.* Bennett, 2 Cal. 101 (1852); Magee *v.* Welsh, 18 Cal. 155 (1861); Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. 902 (1888); Nichols Co. *v.* Snyder, 78 Minn. 502, 81 N. W. 516 (1900); Tupp *v.* Pederson, 78 Minn. 524, 81 N. W. 1103 (1900); New Hampshire Ins. Co. *v.* Noyes, 32 N. H. 345 (1855); International Text Book Co. *v.* Connelly, 206 N. Y. 188, 99 N. E. 722 (1912).

of position.[157] In equity generally the better view is expressed by Stinness, C. J., in *Chase* v. *Chase:*[158]

"Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities and other causes, but when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." [159]

There is no reason, however, why delay longer than the period covered by the statute of limitations should not, without more, bar the plaintiff.[160]

If after the receipt of the money the situation of the defendant has so altered that he cannot restore it without suffering a detriment which he would not have incurred had it not been for the

---

[157] Henson *v.* Culp, 157 Ky. 442, 163 S. W. 455 (1914); Davis *v.* Dudley, 70 Me. 236 (1879); Prout *v.* Wiley, 28 Mich. 164 (1873) (*semble*); Allen *v.* Poole, 54 Miss. 323 (1877) (*semble*); Thomas *v.* Pullis, 56 Mo. 211 (1874); Emmons *v.* Murray, 16 N. H. 385 (1844); Wheaton *v.* East, 5 Yerg. (Tenn.) 41, 62 (1833); Gillespie *v.* Bailey, 12 W. Va. 70 (1877) (*semble*).

[158] 20 R. I. 202, 203, 37 Atl. 804 (1897).

[159] Jonathan Mills Mfg. Co. *v.* Whitehurst, 60 Fed. 81 (1894); O'Brien *v.* Wheelock, 78 Fed. 673 (1897); Wheeling Bridge Co. *v.* Reymann Co., 90 Fed. 189 (1898); Hanchett *v.* Blair, 100 Fed. 817 (1900); London Bank *v.* Horton & Co., 126 Fed. 593, 601 (1903); Shea *v.* Nilima, 133 Fed. 209 (1904); Haney *v.* Legg, 129 Ala. 619, 30 So. 34 (1900); Pratt Land Co. *v.* McClain, 135 Ala. 452, 33 So. 185 (1902) (*semble*); Hovey *v.* Bradbury, 112 Cal. 620, 44 Pac. 1077 (1896); Ex-Mission Co. *v.* Flash, 97 Cal. 610, 32 Pac. 600 (1893); Brake *v.* Payne, 137 Ind. 479, 37 N. E. 140 (1893); Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368 (1897); Fitzgerald *v.* Constr. Co., 44 Neb. 463, 62 N. W. 899 (1895); Daggers *v.* Van Dyck, 37 N. J. Eq. 130 (1883); Tynan *v.* Warren, 53 N. J. Eq. 313, 31 Atl. 596 (1895); Lundy *v.* Seymour, 55 N. J. Eq. 1, 35 Atl. 893 (1896); Law *v.* Smith, 59 Atl. 327, 68 N. J. Eq. 81 (1904); Farr *v.* Hauenstein, 69 N. J. Eq. 740 (1905); Parker *v.* Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209 (1896); Hamilton *v.* Dooly, 15 Utah, 280, 49 Pac. 769 (1897); Tidball's Executors *v.* Shenandoah Bank, 42 S. E. 867 (W. Va.) (1902); Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571 (1901); Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874); Erlanger *v.* Sombrero Co., 3 App. Cas. 1218, 1279 (1878).

[160] Gray *v.* Goddard, 90 Conn. 561, 98 Atl. 126 (1916); Shelburne *v.* Robinson, 8 Ill. 597 (1846); Ely *v.* Norton, 1 Hals. (N. J. L.) 187 (1822). See Fitzsimmons *v.* Johnson, 90 Tenn. 416 (1891).

payment, he will not be compelled to disgorge. "Change of position" here,[161] as elsewhere in the law of quasi contracts,[162] is a defense. The change of position may consist in loss of rights on the claim or instrument on which payment is made,[163] in delay in enforcing rights against others,[164] the payment over by an agent of money to his principal,[165] or by a fiduciary to his beneficiary.[166]

[161] Brooking *v.* Farmers' Bank, 83 Ky. 431 (1885); Ridgway *v.* Newstead, 3 De G., F. & J. 474, 487 (1861). See Phetteplace *v.* Bucklin, 18 R. I. 297, 27 Atl. 211 (1893).

[162] German Security Bank *v.* Columbia Trust Co., 27 Ky. L. R. 581, 85 S. W. 761 (1905); Pelletier *v.* State Nat. Bank, 117 La. 335, 41 So. 640 (1906); Wilson *v.* Barker, 50 Me. 447 (1862); Walker *v.* Conant, 65 Mich. 194, 31 N. W. 786 (1887); 69 Mich. 321, 17 N. W. 292 (1888); Pickslay *v.* Starr, 149 N. Y. 432, 44 N. E. 163 (1896); Continental Nat. Bank *v.* Tradesman's Bank, 173 N. Y. 272, 65 N. E. 1108 (1903); Ball *v.* Shepard, 202 N. Y. 247, 95 N. E. 719 (1911); Fegan *v.* Gt. Northern Ry. Co., 9 N. D. 30, 81 N. W. 39 (1899); Boas *v.* Updegrove, 5 Pa. 516 (1847); Atlantic Coast Line *v.* Schirmer, 87 S. C. 309, 69 S. E. 439 (1910); Richey *v.* Clark, 11 Utah 467, 40 Pac. 717 (1895). And see Deutsche Bank *v.* Beriro & Co., 73 L. T. R. 669 (1895); Maher *v.* Miller, 61 Ga. 556 (1878); Guild *v.* Baldridge, 2 Swan (Tenn.) 295 (1852); KEENER, QUASI CONTRACTS, 59; WOODWARD, QUASI CONTRACTS, §§ 26–30; Costigan, "Change of Position as a Defense," 20 HARV. L. REV. 212. If the mistake is due to defendant's fault, change of position is no defense, for he only has himself to blame. Union Bank *v.* United States Bank, 3 Mass. 74 (1807); Koontz *v.* Central Nat. Bank, 51 Mo. 275 (1873); Phetteplace *v.* Bucklin, 18 R. I. 297, 27 Atl. 211 (1893); Metcalf *v.* Denson, 4 Baxt. (Tenn.) 565 (1874).

[163] German Security Bank *v.* Columbia Trust Co., 27 Ky. L. R. 581, 85 S. W. 761 (1905); Pelletier *v.* State Nat. Bank, 117 La. 335, 41 So. 640 (1906).

[164] Behring *v.* Somerville, 63 N. J. L. 568, 44 Atl. 641 (1899); Fegan *v.* Great Northern Ry., 9 N. D. 30, 81 N. W. 39 (1899); Boas *v.* Updegrove, 5 Pa. 516 (1847); Atlantic Coast Line R. Co. *v.* Schirmer, 87 S. C. 309, 69 S. E. 439 (1909); Richey *v.* Clark, 11 Utah, 467, 40 Pac. 717 (1895). Durrant *v.* Ecclesiastical Comm'rs, 62 Q. B. D. 234 (1880); Kingston *v.* Eltinge, 40 N. Y. 391 (1869); Houston R. Co. *v.* Hughes, 63 Tex. Civ. App. 514 (1911), *Contra*. It is doubtful, however, whether Kingston *v.* Eltinge, which is clearly erroneous, would now be followed in New York in view of Continental Nat. Bank *v.* Tradesman's Bank, 173 N. Y. 272, 65 N. E. 1108 (1903); Hathaway *v.* County of Delaware, 185 N. Y. 368, 78 N. E. 153 (1906); Ball *v.* Shepard, 202 N. Y. 247, 95 N. E. 719 (1911). See KEENER, QUASI CONTRACTS, 66, 67; WOODWARD, QUASI CONTRACTS, § 25, note; Costigan, "Change of Position as a Defense," 20 HARV. L. REV. 215, note.

[165] Holland *v.* Russell, 1 B. & S. 424 (1861); 4 B. & S. 14 (1863); Shand *v.* Grant, 15 C. B. (N. S.) 324 (1863); Hooper *v.* Robinson, 98 U. S. 528 (1878); Hibbs *v.* Beall, 41 App. D. C. 592; Maher *v.* Miller, 61 Ga. 556 (1878); Granger *v.* Hathaway, 17 Mich. 500 (1869). See Martin *v.* Allen, 125 Mo. App. 636, 103 S. W. 138 (1907); Mason *v.* Commerce Trust Co., 192 Mo. App. 528, 183 S. W. 707 (1915); 23 L. R. A. (N. S.), note. Through an extraordinary misconception of the true principles underlying the subject

[166] Yarborough *v.* Wise, 5 Ala. 292 (1843); Beam *v.* Copeland, 54 Ark. 70, 14 S. W. 1094 (1890); Grier *v.* Huston, 8 Serg. & R. (Pa.) 402 (1822). But see Baylis *v.* Bishop of London, [1913] 1 Ch. 127.

Sale, consumption, or gift of the windfall before notice of the plaintiff's right cannot necessarily and always give a defense.[167] If the defendant has spent it beneficially to himself, he should clearly refund the equivalent. If he carelessly loses it, or spends it in riotous living, he should still be liable. In these cases he should not be in a better position than the frugal man who has invested and kept the *res*. "It must be assumed that the defendant has had his money's worth of enjoyment."[168] If he gives the legacy to the Red Cross as his normal periodical contribution we should still reach, though without authority, the same result. Suppose, however, in consequence of the windfall he has altered his manner of living. He has journeyed to Palm Beach, an outing beyond his normal income, or he has shared his good fortune with Belgian refugees whom he otherwise could not aid. It is intimated in *Brisbane* v. *Dacres*,[169] and in *Skyring* v. *Greenwood*,[170] that the plaintiff could not reach him.[171] A real hardship would result if he were compelled to make whole the payer. The wiser view is to leave matters in *statu quo*, rather than shift the plaintiff's loss to the defendant's shoulders. The same result should be reached, though only on the authority of text-writers,[172] if the property received has before notice been without defendant's fault accidentally lost, as by fire or theft. The claim that the defendant is a purchaser for value without notice from the overpaid creditor or legatee is clearly a defense both at law and in equity.[173]

---

the Court of Appeal in Baylis *v.* Bishop of London, [1913] 1 Ch. 127, held that change of position as a defense was confined to payment by an agent to his principal.

If the agent purported to act for himself in receiving the payment, it is no defense that he settled with his principal before notice. Newall *v.* Tomlinson, L. R. 6 C. P. 405 (1871); United States *v.* Pinover, 3 Fed. 305 (1880); Smith *v.* Kelly, 43 Mich. 390, 5 N. E. 437 (1880); Canal Bank *v.* Bank of Albany, 1 Hill (N. Y.) 287 (1841). See Costigan, 20 HARV. L. REV. 211. This distinction, however, is without merit.

[167] Standish *v.* Ross, 3 Exch. 527 (1849); Continental Co. *v.* Kleinwort Co., 20 T. L. R. 403 (1904); Moors *v.* Bird, 190 Mass. 400, 410, 77 N. E. 643 (1906); Picotte *v.* Mills, 203 S. W. 825 (Mo. App.) (1918).

[168] Costigan, "Change of Position as a Defense." 20 HARV. L. REV. 212, note.

[169] 5 Taunt. 143, 152.

[170] 4 B. & C. 281, 289 (1825).

[171] But see Standish *v.* Ross, 3 Exch. 527, 534 (1849).

[172] Costigan, "Change of Position as a Defense." 20 HARV. L. REV. 212, note. Compare WOODWARD, QUASI CONTRACTS, § 30.

[173] Berton *v.* Anderson, 56 Ark. 470, 20 S. W. 250 (1892); Hoffman *v.* Armstrong, 90 Md. 123 (1899). See Thompson *v.* Samson, 64 Cal. 330, 30 Pac. 980 (1883).

A defendant obliged to refund is liable for interest from the date of demand and

The liability of several legatees and distributees, who have been overpaid, is not joint.[174] Failure to join others is no defense. But, in Massachusetts, Michigan, Nebraska, Ohio, Rhode Island, and Vermont, the court may at any time order joined other parties liable.[175] And in Illinois the liability is joint.[176] At common law in England, if the estate had been administered under order of the court, the belated creditor could proceed against any particular legatee or distributee only for such portion of his debt as the value of the legatee's or distributee's share bore to all legacies and shares.[177] This rule, however, did not apply when the administration did not take place under order of court.[178] In this country the authorities are divided, — none of them seem to take the English distinction. In some jurisdictions the beneficiary is liable up to the full amount of his legacy or share for the plaintiff's claim, and must seek contribution in a separate suit from the other beneficiaries.[179] In other states the defendant is only liable for his rateable proportion of the debt.[180] A third view makes the defendant liable for a proportional amount unless the others liable are insolvent or beyond the jurisdiction. In that case he must make good the debt up to the amount he has received and seek contribution in another suit.[181] Perhaps

from that date only. Northrop *v.* Graves, 19 Conn. 548 (1849). And see Gittens *v.* Steele, 1 Swanst. 199 (1818); Jervis *v.* Wolferstan, L. R. 18 Eq. 18 (1874); Uffner *v.* Lewis, 5 Ont. L. R. 684 (1903).

[174] INDIANA, ANNOT. STATS. (1914), § 2972; Rubell *v.* Bushnell, 91 Ky. 251, 15 S. W. 520 (1891); Rohrbaugh *v.* Hamblin, 57 Kan. 393, 46 Pac. 705 (1896); MASSACHUSETTS, REV. LAWS (1902), c. 141, § 30; MICHIGAN, COMP. LAWS (1915), c. 234, c. 56, § 25; Miller *v.* Shoaf, 110 N. C. 319, 14 S. E. 400 (1892); Walker *v.* Deaver, 79 Mo. 664, 679 (1883); NEBRASKA, REV. STATS. (1913), § 1414; OHIO, ANNOT. GEN. CODE (1912), § 10882; RHODE ISLAND, GEN. LAWS (1909), c. 318, § 22; Gillespie *v.* Alexander, 3 Russ. 130 (1826).

[175] See references in preceding note.

[176] Cutright *v.* Stanford, 81 Ill. 240 (1876). See Lewis *v.* Overby, 31 Gratt. (Va.) 601, 619 (1879); McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210 (1903).

[177] Gillespie *v.* Alexander, 3 Russ. 130 (1826).

[178] Davies *v.* Nicolson, 2 De G. & J. 693 (1858).

[179] Rubel *v.* Bushnell, 91 Ky. 251, 15 S. W. 520 (1891); Miller *v.* Shoaf, 110 N. C. 319, 14 S. E. 800 (1892).

[180] ALABAMA, CODE (1907), § 2785; ARKANSAS, DIG. STATS. (1916), c. 1, § 164; COLORADO, ANNOT. STATS. (1912), § 8027; Cutright *v.* Stanford, 81 Ill. 240 (1876); Lewis *v.* Overby, 31 Gratt. (Va.) 601, 618–20 (1879); KANSAS, GEN. STATS. (1915), § 4658; MISSOURI, REV. STATS. (1909), § 255. And see MICHIGAN, COMP. LAWS (1915), c. 234, c. 56, §§ 23, 25, 28; NEBRASKA, REV. STATS. (1913), §§ 1412, 1417; VERMONT, PUB. STATS. (1906), c. 137, §§ 2912–20.

[181] INDIANA, ANNOT. STATS. (1914), § 2970; MASSACHUSETTS, REV. LAWS (1092),

the best solution is that suggested in a leading Virginia case. There by a creditor's bill all parties interested, including the personal representative, were brought into court and each held liable for his rateable proportion so far as that was possible without injury to the creditor's right. All conflicting rights may then be settled in one suit.[182]

Joseph Warren.

HARVARD LAW SCHOOL,
CAMBRIDGE, MASS.

---

c. 141, § 31; OHIO, ANNOT. GEN. CODE (1912), § 10881; RHODE ISLAND, GEN. LAWS (1909), c. 318, § 24; WISCONSIN, STATS. (1915), § 3867; McClung *v.* Sieg, 54 W. Va. 467 (1903).

[182] Lewis *v.* Overby, 31 Gratt. (Va.) 601, 619–20 (1879). See McClung *v.* Sieg, 54 W. Va. 467, 46 S. E. 210 (1903), where some parties were out of the jurisdiction.